

2/16/334

STATE OF SOUTH CAROLINA

(Caption of Case)

Happy Rabbit, LP on behalf of Windridge
Townhomes,
Complainant,

v.

Alpine Utilities, Inc.,
Defendant.

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET
NUMBER: 2008 - 360 - S

(Please type or print)

Submitted by: Benjamin P. Mustian, Esquire

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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition☐ Request for item to be placed on Commission's Agenda expeditiously☒ Other:

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)			
<input type="checkbox"/> Electric	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Letter	<input type="checkbox"/> Request	
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certification	
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigation	
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement	
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment	
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter	
<input type="checkbox"/> Gas	<input type="checkbox"/> Certificate	<input type="checkbox"/> Petition for Rulemaking	<input checked="" type="checkbox"/> Response	
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discovery	
<input checked="" type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition	
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation	
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Prefiled Testimony	<input type="checkbox"/> Subpoena	
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff	
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other: _____	
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest		
<input type="checkbox"/> Other: _____	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit		
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report		

Print Form

Reset Form

WILLOUGHBY & HOEFER, P.A.

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April 16, 2009

VIA HAND-DELIVERY

The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RECEIVED
APR 16 2009
PUBLIC SERVICE
COMMISSION

RE: Happy Rabbit, LP on behalf of Windridge Townhomes v. Alpine Utilities, Inc.;
Docket No. 2008-360-S

Dear Mr. Terreni:

Enclosed for filing on behalf of Alpine Utilities, Inc. are the original and one (1) copy of Alpine Utilities, Inc.'s Response to Motion to Amend Complaint in the above-referenced matter. By copy of this letter, I am serving a copy of these documents upon the parties of record and enclose a Certificate of Service to that effect.

I would appreciate your acknowledging receipt of these documents by date-stamping the extra copies that are enclosed and returning the same to me via our courier.

If you have any questions, or if you need any additional information, please do not hesitate to contact me.

Sincerely,

WILLOUGHBY & HOEFER, P.A.



Benjamin P. Mustian

BPM/cf

Enclosures

cc: Nanette S. Edwards, Esquire
Richard L. Whitt, Esquire

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-360-S

RECEIVED
PUBLIC SERVICE
COMMISSION
SOUTH CAROLINA
JAN 21 2009

IN RE:)
)
Happy Rabbit, LP on behalf of Windridge,)
Townhomes,)
)
Complainant)
)
v.)
)
Alpine Utilities, Inc.,)
)
Defendant.)
_____)

**RESPONSE TO COMPLAINANT'S
MOTION TO AMEND COMPLAINT**

Pursuant to Public Service Commission of South Carolina ("Commission") Regulation R. 103-828 and 103-829, and other applicable statutes, rules and regulations, Alpine Utilities, Inc. ("Alpine") herein responds to the Motion to Amend Complaint of Happy Rabbit, LP ("Happy Rabbit" or "Complainant"). In support thereof, Alpine would respectfully show as follows:¹

**I. MOTION TO AMEND COMPLAINT WOULD
UNFAIRLY PREJUDICE ALPINE**

Alpine asserts that permitting Happy Rabbit to amend its complaint at this late date would be unduly prejudicial to the Company. "The focal inquiry in allowing amendment of pleadings is

¹ In the event that Alpine does not herein directly dispute a claim, statement, representation or characterization by Happy Rabbit or assert or state a position previously set forth, such omission is neither an acquiescence to any of Happy Rabbit's claims, statements, representations, or characterizations nor a waiver of any position previously asserted by Alpine.

whether doing so will prejudice the opposing party.” Pool v. Pool, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998). “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” Ball v. Canadian American Exp. Co., Inc., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (1994) (holding that referee erred by granting plaintiff’s motion to amend pleadings to assert a new cause of action). Both Happy Rabbit and Alpine have prefiled testimony and presented their arguments to the Commission in this matter and at no time has any party of record asserted the claim now set forth by the Complainant.² As the Commission is aware, Alpine has consistently asserted that the Complaint filed by Happy Rabbit is vague and ambiguous, does not conform to the relevant statutory and regulatory requirements regarding complaints, and does not place Alpine on notice of the issues involved. Now, in an apparent effort to cure the defects on the face of the Complaint, Happy Rabbit attempts to interject a wholly new cause of action at the eleventh hour.

In point of fact, Happy Rabbit has consistently acknowledged that the original Complaint filed in this action did not seek any refund or monetary damages. Rather, Happy Rabbit elucidated that the original Complaint requests that the Commission “decide the proper utility and customer business relationship to be maintained in the future with tenants at the Windridge Townhomes.” Happy Rabbit’s Reply to Motion to Dismiss, p. 3, para. 9.³ In actuality, Happy Rabbit is not seeking

² Alpine is aware that Happy Rabbit has filed a Motion to Conform to Proof which requests similar relief to assert a new cause of action. As of the date of this filing, however, the Commission has not ruled on this request.

³ Happy Rabbit has made several similar assertions in its filings with the Commission suggesting that, while the circuit court action seeks monetary damages, the Commission has jurisdiction over this action inasmuch as they seek a determination as to the “business relationship” between Alpine and Happy Rabbit:

to amend its pleadings; rather, Happy Rabbit is attempting to initiate an entirely new claim. All of the parties have completed the presentation of their witnesses' testimony in this matter and at no time has the concept of "willful overcharges" been discussed.⁴ Therefore, this late request to amend the complaint and introduce entirely new claims would unfairly prejudice Alpine in this proceeding.

II. HAPPY RABBIT HAS NOT BEEN "WILLFULLY OVERCHARGED"

Alpine denies Happy Rabbit's assertion that the Company "willfully overcharged Happy despite being placed on notice of Section 27-33-50." Regulation 103-533 relating to overcharges states:

"It is axiomatic that the [Commission] may not award monetary damages and enforce statutes completely unrelated to its jurisdiction. Because monetary damages are sought and a violation of the South Carolina Unfair Trade Practices Act is alleged, that cause of action is properly before the circuit court and those matters may not be heard by the [Commission]." Happy Rabbit's Reply to Motion to Dismiss, p. 2, para. 4.

The Commission Complaint "is simply based on the fact that Alpine improperly established and maintained its utility relationship with Windridge." Happy Rabbit's Reply to Motion to Dismiss, p. 5, para. 14.

"I am seeking an Order from this Commission requiring Alpine to comply with South Carolina Law. Specifically, I want the Commission to require Alpine to establish individual sewer utility accounts with all of Windridge's tenants." Happy Rabbit Witness Cook Direct Test. 3. 2, ll. 6-8.

"I filed the Complaint with this Commission, asking this Commission to declare the utility customer relationship required by Alpine to be unlawful under South Carolina Law. This Commission cannot award money damages, therefore I filed an appropriate action in Circuit Court to recover those damages." Happy Rabbit Witness Cook Direct Test. p. 3, ll. 15-19.

4 To the extent Happy Rabbit asserts that Alpine's admission related to Mr. Cook's communication on October 6, 2003 warrants or supports the newly asserted claim, Alpine would restate and incorporate herein by reference its position in this regard as set forth in its Response to

If it is found that a utility has directly or indirectly, by any device whatsoever, demanded, charged, collected or received from **any customer** a greater or lesser compensation for any service rendered or to be rendered by such utility **than that prescribed in the schedules of such utility applicable thereto**, then filed in the manner provided in Title 58 of the South Carolina Code of Laws; or if it is found that any customer has received or accepted any service from a utility for a compensation greater or lesser than that prescribed in such schedules; or if, for any reason, billing error has resulted in a greater or lesser charge than that incurred by the customer for the actual service rendered, then the method of adjustment for such overcharge or undercharge shall be [made by certain methods] (Emphasis supplied).

Additionally, Regulation 103-533.3 states “[i]f the utility has willfully overcharged any customer, the utility shall refund the difference, plus interest, as prescribed by the commission for the period of time that can be determined that the customer was overcharged.”

As an initial matter, Alpine would demonstrate that it has not overcharged Happy Rabbit. Alpine has only charged Happy Rabbit in accordance with its Commission approved rate schedule and Happy Rabbit has not asserted otherwise; therefore, any assertion that Alpine has “overcharged” Happy Rabbit is inapt. Additionally, Happy Rabbit has admitted it is a customer of Alpine and admitted that it receives sewer service from Alpine. See Responses to Alpine’s First Set of Requests to Admit. Therefore, pursuant to Commission regulations, Happy Rabbit is obligated to compensate Alpine for services rendered. See R. 103-534.B. Happy Rabbit acknowledges that it has paid for such services; however, said compensation was not greater than or less than that prescribed in Alpine’s applicable rate schedules. Finally, Alpine has not “willfully overcharged Happy Rabbit” inasmuch as Alpine’s charges for services rendered to Happy Rabbit as its customer were not willfully overcharged. ‘Wilful’ (*sic*) means ‘intentional.’ “ Reeves v. Carolina Foundry & Mach.

Motion to Conform. See Alpine Reponse to Motion to Conform, p. 5.

Works, 194 S.C. 403, 9 S.E.2d 919 (1940). Happy Rabbit appears to assert that Alpine intentionally contravened the prohibitions set forth in Section 27-33-50. To the contrary, as Alpine has continually asserted in this proceeding, Section 27-33-50 does not prohibit Alpine from charging customers such as Happy Rabbit for services rendered to it. Moreover, the facilities necessary to serve in the manner so desired by Happy Rabbit are insufficient to serve in accordance with Commission regulations. Therefore, Alpine is prohibited by regulation from serving in the manner stated by Happy Rabbit. Such circumstances patently disprove Happy Rabbit's assertion that such charges made for services rendered were "willful." However, if Happy Rabbit believed that the charges submitted in this regard were unlawful, Happy Rabbit, over the past **five and one-half years since its communication with Alpine**, could have refused payment to Alpine based upon its interpretation of the statute or could have previously initiated a proceeding with the South Carolina Office of Regulatory Staff or the Commission.

III. THE RELIEF REQUESTED WOULD RESULT IN A WINDFALL

If the Motion to Amend Complaint is granted, Happy Rabbit's claim for reimbursement, if allowed, would amount to a windfall for the Complainant. Happy Rabbit has admitted that it is a customer of Alpine, that Happy Rabbit receives sewer service from Alpine, and that none of the tenants of Windridge Townhomes have established customer relationships with Alpine. Therefore, the relief which Happy Rabbit requests would essentially result in Happy Rabbit being reimbursed for charges rendered in connection with services which it has received over the past three years at rates approved by the Commission. Such an outcome would effectively result in Happy Rabbit receiving the benefit of free sewer service for this extended period of time at the expense of Alpine.

These facts demonstrate that Happy Rabbit's request in this regard would yield a windfall for the Complainant and that, therefore, its request to introduce this claim at this time should be denied.

IV. LACK OF JURISDICTION

Alpine would respectfully reiterate and incorporate by reference herein its position set forth in its Motion to Dismiss and Motion for Summary Judgment. Happy Rabbit's claims purportedly set forth in its original Complaint and its Motion to Amend Complaint arise under Title 27 of the South Carolina Code over which the Commission does not have jurisdiction. The Commission's enabling legislation does not grant it the authority to enforce disputes arising under Title 27 of the South Carolina Code. Moreover, as expressly stated in Alpine's previous pleadings, the damages sought in the proposed amended complaint are wholly included within the damages sought in Happy Rabbit's claim currently pending before the circuit court. Therefore, the Complaint should be dismissed and the Motion to Amend Complaint should be denied inasmuch as the Commission and the circuit court do not enjoy concurrent jurisdiction. Cf. S.C. Code Ann. § 58-5-270 (Supp. 2008).

V. STATUTE OF LIMITATIONS

Happy Rabbit has asserted that the Amended Complaint is based upon a statutory cause of action pursuant to S.C. Code Ann. § 27-33-50. To the extent the Commission has jurisdiction over this matter, which Alpine expressly denies, Happy Rabbit is therefore precluded as a matter of law from asserting a claim against Alpine regarding charges imposed for sewer services rendered because the statute of limitations has long since expired.

"Statutes of limitation are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." Moates v. Bobb, 322 S.C. 172, 470 S.E.2d 402, 404 (Ct. App. 1996). "[S]tatutes [of limitations] are designed to promote justice by

forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs.” State ex rel. Condon v. City of Columbia, 339 S.C. 8, 528 S.E.2d 408, 413-414 (2000). “South Carolina’s statute of limitations requires ‘very little to start the clock.’” Maier v. Tietex Corp., 331 S.C. 371, 500 S.E.2d 204, 208 (Ct. App. 1998) (quoting Roe v. Doe, 28 F.3d 404, 407 (4th Cir. 1994)). It runs from the date the injury is discoverable by the exercise of reasonable diligence. Dean v. Ruscon Corp., 321 S.C. 260, 468 S.E.2d 645, 647 (1996) (“According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises. . . .”); Republic Contracting Corp. v. S.C. Dep’t of Highways and Public Transp., 332 S.C. 197, 503 S.E.2d 761, 766 (Ct. App. 1998) (“An injured party must act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim against another party might exist.”).

The statute of limitations for this action is three years. S.C. Code Ann. § 15-3-530. The South Carolina Supreme Court has “held that a defective complaint cannot be amended to state a new or different cause of action after the statute of limitations has run.” Scott v. McCain, 272 S.C. 198, 250 S.E.2d 118, 121 (1978) (citing Crocker v. S.C. State Highway Dep’t, 268 S.C. 147, 232 S.E.2d 340 (1977) (“After the statute has run, the complaint can not be amended to state a cause of action.”) and Kennemore v. S.C. Highway Dep’t, 199 S.C. 85, 18 S.E.2d 611 (1942) (“The time for bringing suit having lapsed, the Court was without power to allow an amendment giving a cause of action where none was alleged and where none could then exist.”))).

Even if Happy Rabbit's Amended Complaint is appropriate, which Alpine denies, Happy Rabbit's claim set forth in the Amended Complaint is premised upon a violation of Section 27-33-50. And, if the Commission has jurisdiction over this matter, which Alpine denies, its jurisdiction exists only as a result of a purported liability arising out of its application. Therefore, any action brought before the Commission to enforce its requirements would be subject to the applicable statute of limitations for liabilities created by a statute. See S.C. Code Ann. §15-3-530(2). The statute of limitations for Happy Rabbit to bring a claim arising out of Alpine's imposition of charges expired prior to the September 16, 2008 filing of the initial complaint in this matter. In fact, the statute of limitations expired on January 1, 2006, three years after this statute became effective. See Anonymous Taxpayer v. South Carolina Dept. of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008) (holding the statute of limitations for actions based upon a liability created by statute is three years from the date of a change in the law). Notwithstanding Alpine's assertion in this regard, the latest this action could have been timely brought was October 6, 2006, or three years after Mr. Cook purportedly notified Alpine of Section 27-33-50. See S.C. Code Ann. §15-3-530. "The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." *Id.* at 439, 80. Because Mr. Cook, as general partner of Happy Rabbit, was himself aware of Section 27-33-50 no later than October 6, 2003, any claim or liability arising out of the application of that statute should have been brought within three years of that date. Happy Rabbit's failure to do so bars the relief requested in the Amended Complaint as untimely and should not be permitted by the Commission.

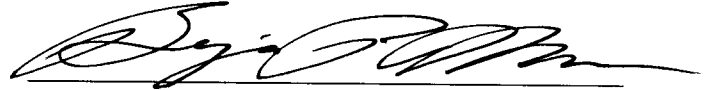
VI. DOCTRINE OF LACHES

In addition to being time-barred by the statute of limitations as a matter of law, Happy Rabbit's complaint is also barred by the equitable doctrine of laches. "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525, 527 (1988). To establish laches, a party must show (1) delay, (2) that the delay was unreasonable, and (3) prejudice. Id. at 528. All elements are present in the instant matter.

Happy Rabbit states in its Motion to Amend Complaint that Happy Rabbit provided notice of Section 27-33-50 on or about October 6, 2003. Now, over five and one-half years later, Happy Rabbit seeks a reimbursement of charges paid to Alpine even though Happy Rabbit itself was then admittedly on notice of the provisions of Section 27-33-50 and asks the Commission to ignore the customer relationship it has acknowledged it entered into with Alpine. See Happy Rabbit Amended Circuit Court Complaint, p. 2.

Happy Rabbit offers no plausible excuse for its unreasonable delay. Assuming that Happy Rabbit has any claims, which Alpine disputes, Happy Rabbit slept on those rights for an unreasonably long period of time. See Lindler v. Adcock, 250 S.C. 383, 388-389, 158 S.E.2d 192, 195 (1967) (holding plaintiff knowingly neglected to do what he could have and should have done for an unreasonable and unexplained length of time and under circumstances which afforded opportunity for diligence). To allow Happy Rabbit to pursue this claim at this late date would unduly prejudice Alpine and, therefore, the Commission should deny Happy Rabbit's Motion to Amend its Complaint.

WHEREFORE, for the foregoing reasons, Defendant respectfully requests that the Commission deny Happy Rabbit's Motion to Amend Complaint and grant such other and further relief to Alpine as is just and proper.



John M.S. Hoefer

Benjamin P. Mustian

WILLOUGHBY & HOEFER, P.A.

Post Office Box 8416

Columbia, South Carolina 29202-8416

803-252-3300

Attorneys for Defendant

Columbia, South Carolina
This 16th day of April, 2009

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2008-360-S**

Happy Rabbit, LP on behalf of Windridge,)
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_____)

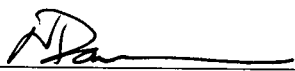
CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of **Defendant's Response to Motion to Amend Complaint** via hand delivery to the address below:

Richard L. Whitt, Esquire
Austin & Rogers, P.A.
508 Hampton Street, Suite 300
Columbia, SC 29211

I further certify that I have caused to be served one (1) copy of the above-referenced document by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Nanette S. Edwards, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211



Nathan Dawson

Columbia, South Carolina
This 16th day of April, 2009.